



SUPREME COURT OF APPEALS

STATE CAPITOL COMPLEX

ROOM E-301

CHARLESTON, WEST VIRGINIA 25305

(304) 558-4811

ROBIN JEAN DAVIS

Justice

April 26, 2018

Hand Delivered

Teresa A. Tarr
Judicial Disciplinary Counsel
City Center East, Suite 1200 A
4700 MacCorkle Avenue, SE
Charleston, West Virginia 25304

Re: Robin Jean Davis
Judicial Investigation Complaint
No. 40-2018

Dear Ms. Tarr:

I am in receipt of the above-referenced complaint dated April 20, 2018. Pursuant to the complaint and your directive, I respond as follows.

I took office on December 16, 1996. From that time until approximately December 2011, the Court began its argument day at 10:00 a.m., and the Court recessed for lunch from 12:30 p.m. until 2:00 p.m. Thereafter, the Court resumed its work on the bench until the docket was finished for the day. Following the conclusion of the docket, the Court held conference to decide that day's cases.

Beginning in January 2012, the Court, comprised of new members, informally changed its schedule. The Court argument day began at 10:00 a.m. However, the Court ceased breaking for lunch from 12:30 p.m. to 2:00 p.m. Instead, the Court took no lunch

break and stayed on the bench hearing arguments until the docket was concluded. Thereafter, the Court resumed its work in conference during a working lunch which was paid for by the Court. In addition to the members of the Court and several visiting judges,¹ some Court employees who were provided lunches included, at times, the Justices' administrative assistants who performed services during working lunches such as copying, typing, and retrieving documents for the Justices. Other employees, whose presence was necessary at times, included the Court Security, Court Counsel and Administrator, and Court Clerk and Assistant Clerk.

The Court's work schedule for argument days and conference days was modified for several reasons. By not breaking for lunch, the litigants, lawyers, and other court participants did not have to wait for the Court to reconvene that extra one and one-half hour. It also is more convenient for visiting judges sitting by special assignment. At the end of arguments, the Court, during a working lunch, decides the cases. The visiting judge could then return to his/her circuit. Thus, there is no need for visiting judges to return to Charleston on a second day to decide the case. Time and taxpayer dollars are saved. Finally, eliminating a one and one-half hour break during the argument day provides the Justices and their staffs additional time to work on research, writing, and other Court matters after concluding their working lunch.

The decision to implement this practice was based upon the Court's Constitutional and inherent authority to make policy decisions for the effective management of the judicial system. As a policy matter, the Court determined that providing a modest budget for working meals for its members and supporting staff was a necessary expenditure because of the uninterrupted long hours that were spent on the Bench and in Chambers resolving the Court's business.

It is important to note that Court-paid working lunches, have been, in the past, provided to many divisions of the Court family. For example, statewide probation meetings are held at City Center East. For a number of years, the Court has paid for lunches during those meetings. Other examples include, but are not limited to, Technology meetings, Juvenile Justice Commission meetings, Mass Litigation Panel Hearings, and the Court's Law Clerk Education Program. This policy is further confirmed by the Court's Director of Financial Management, Sue Racer-Troy, and the Court's Director of Education, Training,

¹Those visiting judges who participated in the Court's working lunches include Wilfong, Evans, Hutchison, Swope, Wilkes, Johnson, Alsop, O'Briant, Clawges, Tabit, Ferguson, Keadle, Hatcher, Mazzone, Holliday, Waters, Carl, Matish, and former Justice Thomas McHugh.

and Access to Justice, Sara Thompson. A copy of Ms. Racer-Troy's memo and documents are attached hereto as Exhibit 1, and a copy of Ms. Thompson's memo is attached hereto as Exhibit 2.

I must also point out that I do not believe that the Court's working meal policy violates any provision of the West Virginia Governmental Ethics Act, W. Va. Code § 6B-1-1 *et seq.* Specifically, I do not believe that the policy constitutes "personal gain," within the meaning of W. Va. Code § 6B-1-2(a). In fact, the West Virginia Ethics Commission issued an Advisory Opinion which supports the Court's policy determination. The Commission issued *Advisory Opinion* No. 2012-27 (June 28, 2012),² wherein it was asked to determine whether a State Licensing Board could supply working meals for its members and staff with government funds. The Advisory Opinion found that the Board could use government funds for such meals. The facts of the case showed that the Board held meetings that could last for five to six hours, and that the working meals were purchased from inexpensive restaurants like Bob Evans. In deciding that the working meals were not for unlawful private gain, the Advisory Opinion held as follows:

Generally, the expenditure of public funds is permissible if there is a legitimate government purpose for the expenditure. The Internal Revenue Service (IRS) guidelines permit meals for public employees when: (1) they are furnished on the agency's premise and (2) they are furnished for the convenience of the employer. The Commission is not authorized to interpret IRS regulations; however, it finds them useful in analyzing whether the expenditure constitutes a taxable fringe benefit, or whether it is a legitimate business/governmental expenditure. If it is the latter, then this supports the conclusion that the overriding benefit is to the public and the public agency since the expenditure is made to enable the agency to perform its statutory duties. Hence, even if there is an incidental benefit to public officials or employees; [sic] still, it is a legitimate governmental business expense, not a taxable fringe benefit. Indeed, if it qualifies as a taxable fringe benefit or compensation, then it would constitute an emolument of office. Public officials are prohibited from increasing their own compensation.

Based upon the facts presented, the Commission finds that it does not violate the Ethics Act for the Requester to provide a working meal to its members and any staff who are required to be present at the meeting as part of their job duties, when the meal is provided for the benefits of the Board, i.e., to

²A copy of the Advisory Opinion is attached hereto as Exhibit 3.

accomplish its work. Here, the Commission finds that the meals are not being furnished with the intent of lavishing an unlawful benefit/compensation upon the Board Members, or any staff who are required to be present. Instead, they are furnished for the convenience of the Board so that it may accomplish its mission more effectively and thereby serve the public.

(Emphasis added; footnotes omitted).

The facts giving rise to this Advisory Opinion, *i.e.*, long meetings lasting five to six hours, working meals to facilitate the governmental business conducted during such meetings, and the necessity of support staff to complete tasks related to such meetings, are exactly the same considerations that led to the Court's adoption of its working meal policy. Just as the Advisory Opinion found, so, too, is the Court's policy based upon the effective management of the Court's Constitutional duties, and not for any personal gain to its members. I must also point out that the Advisory Opinion noted that the IRS permits such expenditures. Specifically, the Department of Treasury - IRS Publication 15-B, titled Employer's Tax Guide To Fringe Benefits 2017, permits meals to be paid if the meals are related to a substantial business reason. A copy of the relevant sections of the IRS Publication is attached hereto as Exhibit 4.

The average cost of the Court-paid lunches in which I participated is approximately \$15.70 per meal. Such an amount is quite reasonable, and thus permitted, under the terms of this Advisory Opinion in order to conduct business of the Court as efficiently and effectively as possible.

I have reviewed Rules 1.1, 1.2, 1.3, 3.13, and 3.15 of the Code of Judicial Conduct that you cite in your letter. The Court, in fact, performed Court business during the working lunches. So, there seems to be no violation of Rules 1.1, 1.2, and 1.3. Moreover, Rule 3.13 seems to apply to things of value being supplied by a third party to garner favor from a judge. Working lunches would not fall into that category. Finally, the Comment to Rule 3.15 indicates there is no need to report expenses for judicial meetings. Working lunches may, in fact, be considered judicial meetings.

In conclusion, I do not believe that the policy adopted by the Court to provide a modest budget for working lunches is violative of Rules 1.1, 1.2, 1.3, 3.13, or 3.15 of the Code of Judicial Conduct. That conclusion is clearly supported by Comment 1 of Rule 3.15. I also do not believe that any statute is violated by the policy. Finally, I believe that the Court had authority under the Constitution and its inherent authority to implement a working lunch policy that enabled the Court to more effectively manage the judicial system of our State.

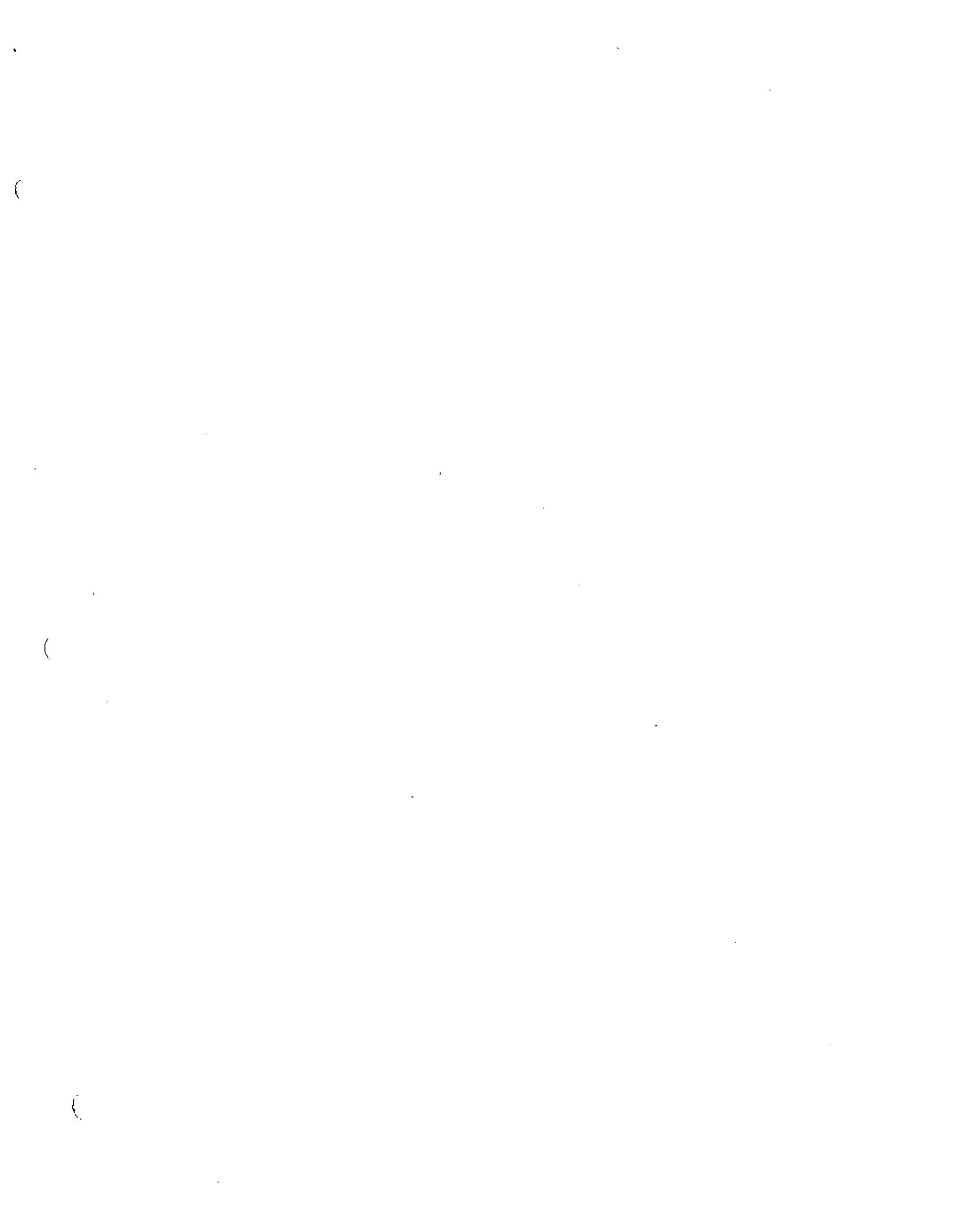
I trust that this letter fully answers your inquiries.

Respectfully,

A handwritten signature in cursive script that reads "Robin Jean Davis". The signature is written in dark ink and is positioned above the printed name.

Robin Jean Davis

Enclosures: Exhibits 1-4



SUPREME COURT OF APPEALS
STATE OF WEST VIRGINIA

GARY L. JOHNSON
ADMINISTRATIVE DIRECTOR



ADMINISTRATIVE OFFICE
BUILDING 1, ROOM E-100
1900 KANAWHA BOULEVARD, E.
CHARLESTON, WV 25305-0832
(VOICE) 304/558-0145
(FAX) 304/558-1212
www.courtsww.gov

To: Justice Robin Davis
From: Sue Racer-Troy *ACT*
Date: April 23, 2018
Subject: Lunch expenditures

() I reviewed p-card transactions for the current fiscal year and located the following examples of hospitality expenditures:

- CIP board – quarterly board meetings
- Board of Law Examiners – board meetings
- Judicial Investigation Commission – meeting
- Judicial Hearing Board - meeting
- Fatality Review – meeting
- Juvenile Justice Commission – board meetings
- Mass Litigation – MLP meetings

- Magistrate Court – lunch during new magistrate training at City Center East
- Magistrate Court – UJA training at City Center East



Invoice date— 7-18-17

Invoice Number— 71817

Contact Person— STACEY

Phone Number— _____

Function— Meeting Supper

Location— 2ND FLOOR

Time— 11:30

Menu—

CHICK TORT SOUP - TORT. TOPPINGS
BROCC CHEESE
CHICKEN NOODLE

Tossed SALAD - IT Ranch - garbanzo - olives
MAND OR STRAW.

SPINACH ORZISS

GARLIC BREAD

BOWTIES \$ 315.00

PICK UP CROCK POTS - after
2 PM.

Delivery Fee— \$ 100

Tax— _____

Total— \$ 325.00

AAA Catering—Judy Byrne

Serving the Kanawha Valley for over 30 years!

P.O. Box 4334—Charleston, West Virginia—25304

304-437-4344 - www.aacatering.net

Mullins, Stacie

From: JUDYBYRNE1969@GMAIL.COM
Sent: Friday, August 18, 2017 1:51 PM
To: Mullins, Stacie
Subject: Order Confirmation

Order Results

Profile Name: AAA CATERING
Transaction ID: 180817A14-6A53D599-31B8-46B6-81A8-1F6B633F932D
Date/Time: 08/18/2017 01:50:37 PM
Transaction Type: SALE
Approval Message: APPROVAL
Approval Code: 024668

Order Section

Card Number: *****8994
Amount: \$325.00USD

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STATE OF WEST VIRGINIA
PURCHASING CARD LOG SHEET

Transaction Limit

Billing Cycle Month

Billing Cycle Year

KANDIL GRETER

4807158000208994

KANAWHA

ADMINISTRATIVE OFFICE

Cardholder Name

Account Number

County

Court / Division

TRANSACTION DATE	VENDOR	ITEM DESCRIPTION	QUANTITY	TOTAL AMOUNT	R* D* C*
08/02/17	Office Max	Supplies (MH)		\$67.50	R
08/03/17	Tyler Mountain Water	Water		\$119.00	R
08/04/17	Office Max	Supplies (CIP Training Grant)		\$95.99	R
08/16/17	USPS	Stamps (Bailiffs Conference Grant)		\$122.50	R
08/16/17	USPS	Stamps (Bailiffs Conference Grant)		\$49.00	R
08/16/17	Office Max	Supplies (MH)		\$3.67	R
08/16/17	Office Max	Supplies (2nd, 8th and 9th Floor)		\$607.41	R
08/18/17	AAA Catering	Lunch for Board Meeting (CIP Grant)		\$325.00	R
08/22/17	Office Max	Supplies UJA)		\$227.25	R
08/24/17	Cisco systems	Webex for the year (CIP GRANT)		\$297.89	R
08/26/17	Webex	Monthly webex charge (CIP Grant)		\$49.00	R
8/29/17	Ring Central	Yearly fax charge		GRAND TOTAL AMOUNT: 256.69 R 2,220.50	

I hereby certify that the items listed hereon have been received and properly accounted for and approved for payment.

[Signature]
Purchasing Cardholder Signature

9/12/17
Date

*R=Reconciled
*D=Disputed
*C=Carryover

I hereby certify that the items listed hereon have been received and properly accounted for and approved for payment.

[Signature]
Authorizing Supervisor Signature

Date

Pilot

PILOT STORE 474
270 Scott's Fork-Bonnie Road
Sutton, WV 26601
(304) 765-7302
09/15/2017

QSR Counter
DINING ROOM

SALE

Transaction #: 10395191

Qty Name	Price	Total
5 Fajita Chicken	55.00	55.00
5 Fajita Steak	55.00	55.00
1 Queso-bowl	5.29	5.29
1 12 Cookies	6.99	6.99
Subtotal		122.28
Sales Tax		7.34

Received:

Visa 129.62
XXXXXXXXXXXX3994 MANUAL
Approved
Auth #: 082414

catering

Gen Merch Rate	7.34
Total	129.62



047410395191

Pos:10 Clerk:386 09/15/2017 11:08:37



STATE OF WEST VIRGINIA
PURCHASING CARD LOG SHEET

Transaction Limit

Sept.
Billing Cycle Month

2017
Billing Cycle Year

KANDI GRETER
Cardholder Name

4807158000208994
Account Number

KANAWHA
County

ADMINISTRATIVE OFFICE
Court / Division

TRANSACTION DATE	VENDOR	ITEM DESCRIPTION	QUANTITY	TOTAL AMOUNT	R* D* C*
08/31/17	Office Max	Supplies (Office max can not find a receipt)		\$19.99	D
09/08/17	Office Max	Supplies (2nd,8th, 9th floors)		\$159.87	R
09/08/17	Office Max	Supplies (9th Floor)		\$80.99	R
09/08/17	Office Max	Supplies (Education)		\$4.99	R
09/09/17	Office Max	Supplies (Mass Lit)		\$34.29	R
09/09/14	Web Ex	Web Conferencing (CIP) (website down can't get recp)		(\$47.42)	R
09/11/17	Office Max	Supplies (Mass Lit)		\$25.04	R
09/15/17	Pilot	Lunch (CIP Training Committee)		\$129.62	R
09/21/17	Office Max	Supplies (8th 9th Floors)		\$334.20	R
09/26/17	Office Max	Supplies (2nd 9th Floors)		\$27.53	R
09/27/17	Office Max	Supplies (Toner DV Registry 2nd Floor)		\$141.76	R
GRAND TOTAL AMOUNT:				\$910.86	

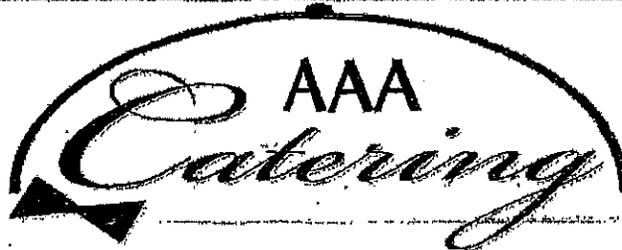
I hereby certify that the items listed hereon have been received and properly accounted for and approved for payment.

[Signature] *10-5-17*
Purchasing Cardholder Signature Date

*R=Reconciled
*D=Disputed
*C=Carryover

I hereby certify that the items listed hereon have been received and properly accounted for and approved for payment.

[Signature]
Authorizing Supervisor Signature Date



Invoice date— 2-02-18

Invoice Number— 20218-1

Contact Person— Kandi

Phone Number— _____

Function— Sup of

Location— 2ND FLOOR

Time— _____

Menu— 35

Baked chicken
Artichoke Rice
Mand. OR SALAD
Stuffed shells
Green Beans
Hot Rolls
Brownies
AP. CRUMB \$ 437.50

Delivery Fee— \$10.00

Tax— _____

Total— \$ 447.50

AAA Catering—Judy Byrne

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304-437-4344 - www.aaacatering.net



STATE OF WEST VIRGINIA
PURCHASING CARD LOG SHEET

Transaction Limit

February
Billing Cycle Month

2018
Billing Cycle Year

KANDI L GRETER
Cardholder Name

4807158000208994
Account Number

KANAWHA
County

ADMINISTRATIVE OFFICE
Court / Division

TRANSACTION DATE	VENDOR	ITEM DESCRIPTION	QUANTITY	TOTAL AMOUNT	R* D* C*
02/01/18	Tyler Mountain	Water (2nd Floor)		\$56.00	R
02/02/18	AAA Catering	Lunch CIP Board Meeting		\$447.50	R
02/05/18	Office Max	Supplies (2nd/9th Floor)		\$68.40	R
02/13/18	Office Max	Supplies (Judicial Ed.)		\$13.38	R
02/13/18	Office Max	Supplies (2nd/9th Floor)		\$52.55	R
02/13/18	Office Max	Supplies (2nd Floor)		\$6.40	R
02/13/18	Office Max	Supplies (2nd/9th Floor)		\$82.95	R
					R
					R
					R
					R
GRAND TOTAL AMOUNT:				\$727.18	

I hereby certify that the items listed hereon have been received and properly accounted for and approved for payment.

[Handwritten Signature] 3-6-18
Purchasing Cardholder Signature Date

*R=Reconciled
*D=Disputed
*C=Carryover

I hereby certify that the items listed hereon have been received and properly accounted for and approved for payment.

[Handwritten Signature] 3-6-18
Authorizing Supervisor Signature Date

Judicial Investigation Commission Meeting
December 8, 2017
Charleston, WV

1. Judge Ronald E. Wilson, Chairperson
2. Judge Christopher C. Wilkes
3. Circuit Court Judge H.L. Kirkpatrick
4. Family Court Judge Robert C. Hicks
5. Mr. Layton Cottrill, Public Member
6. Thomas Burgoyne, Public Member -- by phone
7. Robert Fitzsimmons
8. Magistrate Gail Boober-by video conference
9. Teresa Tarr-Counsel
10. Brian Lanham-Assistant Counsel
11. Pam Schafer-Executive Assistant

south hills market
and café

SOUTH HILLS

Date: 12/8/2017 Time: 10:28:50 AM

Status: Approved

Card Type: Visa
Card Number: XXXXXXXXXXXX4690
Expiration Date: X/XX/XXXX
Server Name: Tasha
Check Number: 23707
Tab Number: 400
Number Of Covers: 0
Persons: 1
Card Owner: Manual Ent

AMOUNT 203.00

TIP 10.00

TOTAL 213.00

Approval: 047361

CUSTOMER COPY

STATE OF WEST VIRGINIA
 DEPARTMENT OF ADMINISTRATION
 TRAVEL MANAGEMENT OFFICE
 REQUEST FOR HOSPITALITY SERVICE

SPENDING UNIT NAME/ORG # Mass litigation Panel

CONTACT PERSON Deb Brogan

TELEPHONE NUMBER 304-340-3440

FUNCTION SPONSOR _____

LOCATION OF FUNCTION Ceremonial Courtroom Kan. Co

DATE(S) OF FUNCTION January 18-19, 2018

ESTIMATED EXPENSES

FOOD AND BEVERAGE

\$ _____

MEETING ROOM

\$ _____

EQUIPMENT RENTAL

\$ _____

LODGING

\$ _____

OTHER/

\$ _____

OTHER/

\$ _____

TOTAL

\$ _____

PURPOSE/JUSTIFICATION OF FUNCTION:

Gwin Landfill Litigation - Mediation

FUNCTION ATTENDEES (Must list individual names unless for a group of 20 or more. A list of attendees for groups of 20 or more must accompany the form):

Judge Becker T. Stephens

Kim Fields

Judge Akaw D. Moats

Deb Brogan

Judge Jay M. Hoke

Harold Bailey

AGENCY AUTHORIZATION FOR THE ABOVE FUNCTION

By: Deb Brogan
FUNCTION REPRESENTATIVE'S SIGNATURE

1-17-18
DATE

By: Kimberley R. Fields
AGENCY HEAD SIGNATURE

1/17/2018
DATE

Brogan, Debra

From: Johnson, Gary
Sent: Friday, January 12, 2018 1:30 PM
To: Brogan, Debra
Cc: Mullins, Joan; Chapman, Cammie; Fields, Kim; Troy, Sue
Subject: RE: Approval for Lunches- Mass Litigation- Mediation-Gavin Landfill Litigation January 18-19, 2018

approved

From: Brogan, Debra
Sent: Friday, January 12, 2018 10:27 AM
To: Johnson, Gary <Gary.Johnson@courtswv.gov>
Cc: Mullins, Joan <Joan.Mullins@courtswv.gov>; Chapman, Cammie <Cammie.Chapman@courtswv.gov>; Fields, Kim <Kim.Fields@courtswv.gov>
Subject: Approval for Lunches- Mass Litigation- Mediation-Gavin Landfill Litigation January 18-19, 2018

Good Morning Judge Johnson.

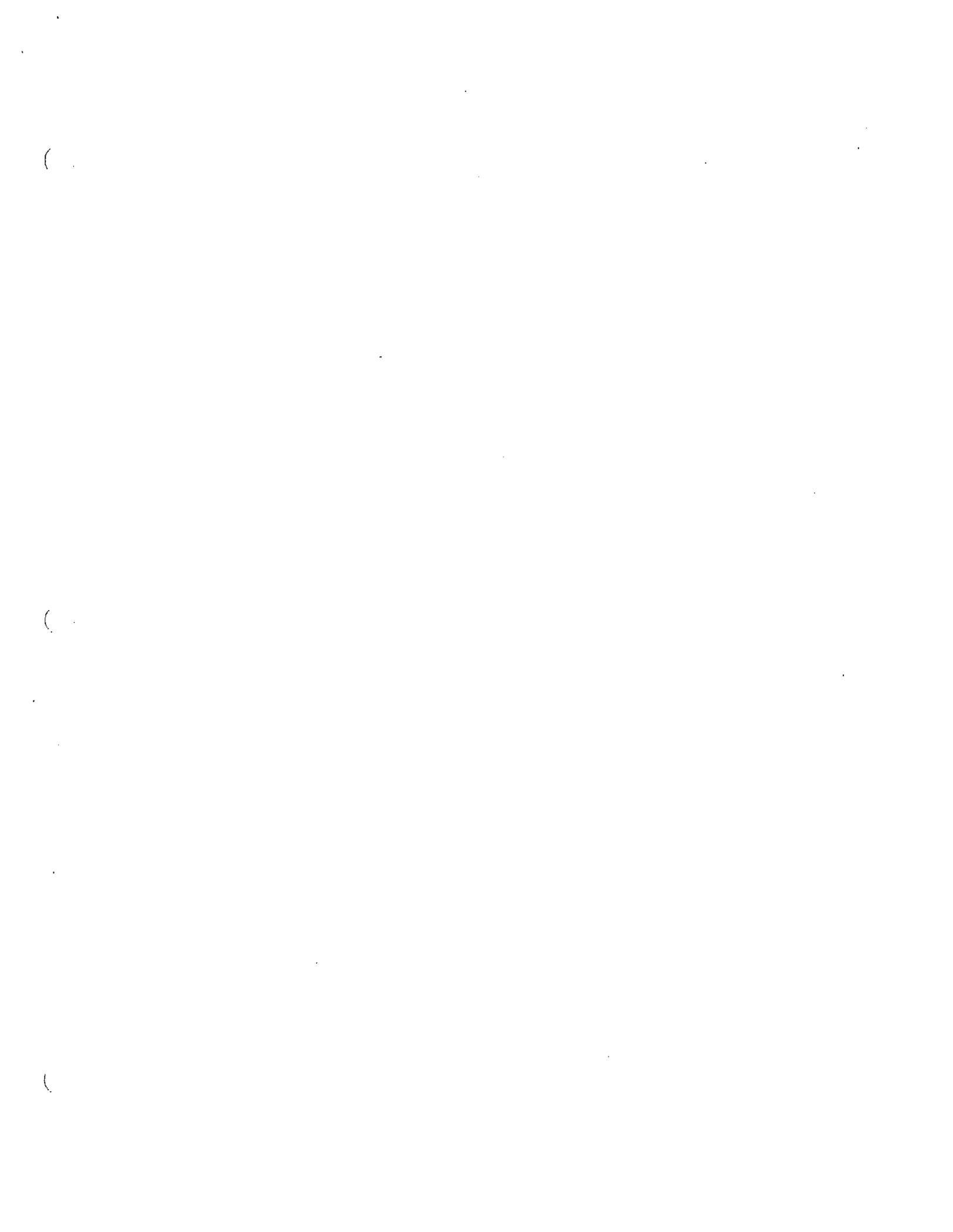
The Resolution Judges assigned to the Gavin Landfill Litigation will be conducting mediation on Thursday, January 18th and Friday January 19th, 2018, in the Ceremonial Courtroom of the Kanawha County Courthouse. I am requesting authorization to order lunches for the following judges and staff on these days, to facilitate working through lunch during the course of mediation:

Judge Booker T. Stephens
Judge Alan D. Moats
Judge Jay Hoke
Kimberley R. Fields
Debra K. Brogan
Harold Dally

Attached is a copy of Request for Hospitality Service. There is no charge to the parties or the Court associated with the use of the ceremonial courtroom.

Please let me know if you have any questions, or need any further information. Thank you.

Debra K. Brogan
Mass Litigation Panel Administrative Assistant
The Supreme Court of Appeals of West Virginia
1900 Kanawha Blvd., East
Charleston, West Virginia 25305
(304) 340-3440 (Office)
(304) 558-0775 (Fax)
(304) 545-6519 (Cell)
Debra.Brogan@courtswv.gov



SUPREME COURT OF APPEALS
STATE OF WEST VIRGINIA

GARY L. JOHNSON
ADMINISTRATIVE DIRECTOR



ADMINISTRATIVE OFFICE
BUILDING 1, ROOM E-100
1900 KANAWHA BOULEVARD, E.
CHARLESTON, WV 25305-0145
304-558-0145 – PHONE
304-558-1212 – FAX
WWW.COURTSWV.GOV

MEMORANDUM

TO: All Law Clerks

FROM: Sara Thompson, Director
Education, Training, and Access to Justice

DATE: February 27, 2018

RE: **REGISTRATION**
2017 All Law Clerks Education Program
Charleston Marriott Town Center, Charleston, West Virginia
March 19-21, 2018

The 2018 All Law Clerks Education Program at Charleston Marriott Town Center will begin 9:00 a.m. on Monday, March 19, 2018 and end late afternoon Wednesday, March 21, 2018. A **draft** conference agenda is attached. On Monday, March 19, 2018, breakfast will be available beginning at 7:00 a.m. and registration will begin at 8:00 a.m.

Attendance is mandatory for all circuit judge law clerks.

LODGING

Hotel accommodations have been authorized for Sunday, Monday, and Tuesday nights for law clerks whose workplace or residence (whichever is closer), is more than 40 miles from the Marriott.

Registration for accommodations is available when you register for the program. The Marriott will direct-bill the Court for the cost of the room; however all other incidental charges are not covered by the court and are the responsibility of the attendee. The Marriott will request a credit card to be placed on file for these charges.

PARKING

For those staying at the Marriott, parking is included in your bill.

For those traveling to the program each day, it is recommended that you park in the Charleston Mall Parking Garage across the street from the Marriott. You will need to pay for your parking and seek reimbursement. Parking cannot be reimbursed without a receipt. If you choose to park in the Marriott's parking garage (15.00 per day), the court will only reimburse up to the cost of mall parking (\$1.75) and you will be responsible for the difference.

MEALS

Breakfast and lunch will be provided each day of the program. There is no reimbursement for meals without an overnight stay.

- **For those who will arrive on Sunday, March 18, 2018,** your per diem will be \$40.50 that day. **On Monday, March 19, 2018,** and **Tuesday, March 20, 2018,** the per diem will be \$32.40. **On Wednesday, March 21, 2018,** the per diem is \$24.30.
- **For those who will arrive on Monday, March 19, 2018,** your per diem that day will be \$24.30. **On Tuesday, March 20, 2018,** the per diem is \$32.40. **On Wednesday, March 21, 2018,** your per diem will be \$24.30

MILEAGE: Mileage will be reimbursed at \$.545 per mile. For those traveling the West Virginia Turnpike, you do **not** need toll receipts for reimbursement.

REGISTRATION

You are required to register for this program online with the below link. **PLEASE REGISTER NO LATER THAN MONDAY, MARCH 5, 2018 BY 12:00 P.M.**

<https://www.regonline.com/2018lawclerkconference>

Sara E. Thompson
Director of Education, Training, and Access to Justice
Supreme Court of Appeals of West Virginia Administrative Office
1900 Kanawha Boulevard, East

()

Building One, Room E-100
Charleston, WV 25305
Office: (304) 558-0145
Cell: (304) 389-4158
Fax: (304) 558-0775

()

()

ADVISORY OPINION NO. 2012-27

Issued On June 28, 2012 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **State Licensing Board** asks under what circumstances the Ethics Act allows it to purchase meals for its members and staff and, if permissible, what monetary limits apply.

FACTS RELIED UPON BY THE COMMISSION

The Requester is a State Licensing Board established under Chapter 30 of the West Virginia Code. Such Boards are commonly referred to as Chapter 30 Boards. Their members are appointed by the Governor and approved by the Senate.

Chapter 30 Boards are comprised of representative members of their regulated professions and members of the general public. These members reside in different parts of the State.

When Chapter 30 Boards meet, at times, the meetings are long. For instance, the Requester has several committees whose meetings often last from five to six hours. To accomplish its work, the Board has working meals. The Requester states that they normally order from an inexpensive restaurant such as Bob Evans and work during the meals. Agency staff members who are present to assist the Board Members also get lunch. The Board uses public funds to purchase the lunches.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code § 6B-2-5(b)(1) reads in relevant part: A public official ... may not knowingly and intentionally use his ... office or the prestige of his ... office for his ... own private gain or that of another person.

ADVISORY OPINION

In determining whether an expenditure of public funds violates the Ethics Act, the Commission relies upon the common law, West Virginia Code, Legislative Rules, Attorney General Opinions and opinion letters issued by the Auditor's Office to determine whether there is express or implied authority for the expenditure. See A.O. 2010-19 wherein the Commission ruled there was no authority for the expenditure of public funds to purchase funeral flowers.

In the present situation, the State Licensing Board states that it has a working lunch to ensure that it accomplishes the work of the board and that its decision to use public

A.O. 2012-27 (Page 1 of 3)

funds for this purpose is based, in large part, upon the fact that its meetings are long and its Board Members travel from various parts of the state. In light of these facts, the Commission must determine whether the expenditure of public funds for this purpose constitutes unlawful private gain to the Board Members and staff, or whether, for purposes of the Ethics Act, it is permissible.

Generally, the expenditure of public funds is permissible if there is a legitimate government purpose for the expenditure. The Internal Revenue Service (IRS) guidelines permit meals for public employees when: (1) they are furnished on the agency's premise and (2) they are furnished for the convenience of the employer.¹ The Commission is not authorized to interpret IRS regulations; however, it finds them useful in analyzing whether the expenditure constitutes a taxable fringe benefit, or whether it is a legitimate business/governmental expenditure. If it is the latter, then this supports the conclusion that the overriding benefit is to the public and the public agency since the expenditure is made to enable the agency to perform its statutory duties. Hence, even if there is an incidental benefit to public officials or employees; still, it is a legitimate governmental business expense, not a taxable fringe benefit. Indeed, if it qualifies as a taxable fringe benefit or compensation, then it would constitute an emolument of office. Public officials are prohibited from increasing their own compensation.²

Based upon the facts presented, the Commission finds that it does not violate the Ethics Act for the Requester to provide a working meal to its members and any staff who are required to be present at the meeting as part of their job duties, when the meal is provided for the benefit of the Board, i.e. to accomplish its work. Here, the Commission finds that the meals are not being furnished with the intent of lavishing an unlawful benefit/compensation upon the Board Members, or any staff who are required to be present. Instead, they are being furnished for the convenience of the Board so that it may accomplish its mission more effectively and thereby serve the public.

Nevertheless, the Commission cautions that this opinion may not be construed as giving State Boards or Commissions unfettered authority under the Ethics Act to expend money for meals. In that regard, the Commission hereby establishes the following guidelines for such expenditures:

- State Boards or Commissions may spend a reasonable amount of public funds for meals at meetings when the meeting takes place at a time or is of such length that it makes the same reasonable.
- The Ethics Act does not authorize any governing body to recess or adjourn a meeting and go to a restaurant (or other off-site location) to consume a meal paid for with public funds. Indeed, governing bodies should take care not to schedule public meetings at private locations unless those meetings take

¹ IRS Quick Reference Guide for Public Employers

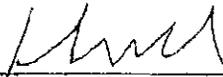
² For this reason, in A.O. 2009-02 the Commission found that a County Funded Employee Wellness Program may not be extended to elected county officials whose compensation is set by statute.

place in a public area fully accessible to the public at no cost to members of the public.

- The agency may not order lavish meals; instead, it must exercise fiscal responsibility in expending public funds on meals for its members and staff.
- The decision to purchase the meal must be based upon a legitimate government reason, i.e. that the agency is having a working lunch or dinner in order that agency business may be conducted most efficiently and effectively.
- The agency must determine whether it has funds to cover this expenditure.
- The ruling in this opinion does **not** extend to local governmental officials and agencies, e.g. City Council Members, County Commissioners or other local agencies. In A.O. 2001-18 the Commission found that the Ethics Act prohibits local government bodies from spending public funds for this purpose.
- A State Board or Commission seeking to expend money for meals at its meetings should check with the Auditor's Office to ensure that it does not run afoul of laws or regulations governing authorized expenditures.

In closing, the guidance offered herein recognizes that the expenditure of public funds for this purpose under the facts presented is acceptable under the general limitations in the Ethics Act against use of office for private gain. This guidance does not confer any benefit or establish that appointed State Board Members are entitled to a working lunch or dinner at the public's expense at each meeting. Instead, the governing body must determine whether the expenditure is consistent with fiscal responsibility and whether appropriated funds may be used for this purpose.

This advisory opinion is limited to questions arising under the Ethics Act, W. Va. Code § 6B-1-1, *et seq.*, and does not purport to interpret other laws or rules. In accordance with W. Va. Code § 6B-2-3, this opinion has precedential effect and may be relied upon in good faith by other public agencies unless and until it is amended or revoked, or the law is changed.



Jonathan E. Turak, Acting Chairperson



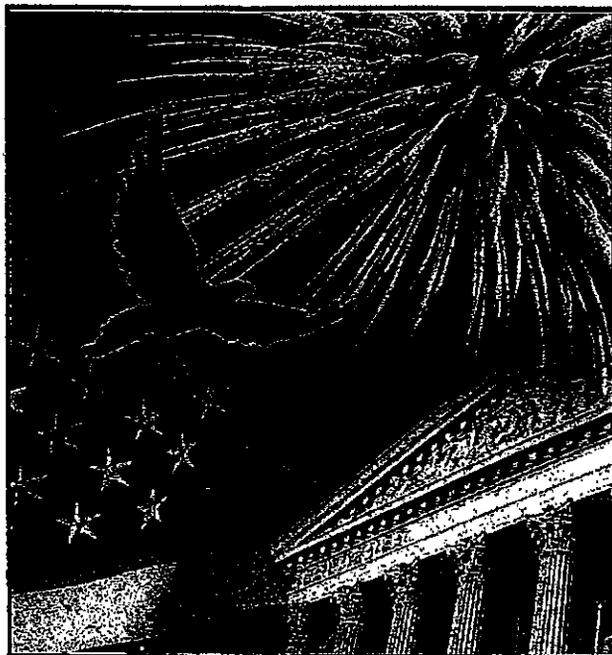
Department of the Treasury
Internal Revenue Service

Publication 15-B

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Employer's Tax Guide to Fringe Benefits

For use in **2017**



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Future Developments

For the latest information about developments related to Pub. 15-B, such as legislation enacted after it was published, go to IRS.gov/pub15b.

What's New

Cents-per-mile rule. The business mileage rate for 2017 is 53.5 cents per mile. You may use this rate to reimburse an employee for business use of a personal vehicle, and under certain conditions, you may use the rate under the

Partnerships and S corporations. Partners and 2% shareholders of an S corporation aren't eligible for salary reduction (pre-tax) contributions to an HSA. Employer contributions to the HSA of a bona fide partner or 2% shareholder are treated as distributions or guaranteed payments as determined by the facts and circumstances.

Cafeteria plans. You may contribute to an employee's HSA using a cafeteria plan and your contributions aren't subject to the statutory comparability rules. However, cafeteria plan nondiscrimination rules still apply. For example, contributions under a cafeteria plan to employee HSAs can't be greater for higher-paid employees than they are for lower-paid employees. Contributions that favor lower-paid employees aren't prohibited.

Reporting requirements. You must report your contributions to an employee's HSA in box 12 of Form W-2 using code "W." The trustee or custodian of the HSA, generally a bank or insurance company, reports distributions from the HSA using Form 1099-SA.

Lodging on Your Business Premises

You can exclude the value of lodging you furnish to an employee from the employee's wages if it meets the following tests.

- It is furnished on your business premises.
- It is furnished for your convenience.
- The employee must accept it as a condition of employment.

Different tests may apply to lodging furnished by educational institutions. See section 119(d) of the Internal Revenue Code for details.

If you allow your employee to choose to receive additional pay instead of lodging, then the lodging, if chosen, isn't excluded. The exclusion also doesn't apply to cash allowances for lodging.

On your business premises. For this exclusion, your business premises is generally your employee's place of work. For example, if you're a household employer, then lodging furnished in your home to a household employee would be considered lodging furnished on your business premises. For special rules that apply to lodging furnished in a camp located in a foreign country, see section 119(c) of the Internal Revenue Code and its regulations.

For your convenience. Whether or not you furnish lodging for your convenience as an employer depends on all the facts and circumstances. You furnish the lodging to your employee for your convenience if you do this for a substantial business reason other than to provide the employee with additional pay. This is true even if a law or an employment contract provides that the lodging is furnished as pay. However, a written statement that the lodging is furnished for your convenience isn't sufficient.

Condition of employment. Lodging meets this test if you require your employees to accept the lodging be-

cause they need to live on your business premises to be able to properly perform their duties. Examples include employees who must be available at all times and employees who couldn't perform their required duties without being furnished the lodging.

It doesn't matter whether you must furnish the lodging as pay under the terms of an employment contract or a law fixing the terms of employment.

Example of qualifying lodging. You employ Sam at a construction project at a remote job site in Alaska. Due to the inaccessibility of facilities for the employees who are working at the job site to obtain lodging and the prevailing weather conditions, you furnish lodging to your employees at the construction site in order to carry on the construction project. You require that your employees accept the lodging as a condition of their employment. You may exclude the lodging that you provide from Sam's wages. Additionally, since sufficient eating facilities aren't available near your place of employment, you may also exclude meals you provide to Sam from his wages, as discussed under *Meals on Your Business Premises*, later in this section.

Example of nonqualifying lodging. A hospital gives Joan, an employee of the hospital, the choice of living at the hospital free of charge or living elsewhere and receiving a cash allowance in addition to her regular salary. If Joan chooses to live at the hospital, the hospital can't exclude the value of the lodging from her wages because she isn't required to live at the hospital to properly perform the duties of her employment.

S corporation shareholders. For this exclusion, don't treat a 2% shareholder of an S corporation as an employee of the corporation. A 2% shareholder is someone who directly or indirectly owns (at any time during the year) more than 2% of the corporation's stock or stock with more than 2% of the voting power. Treat a 2% shareholder as you would a partner in a partnership for fringe benefit purposes, but don't treat the benefit as a reduction in distributions to the 2% shareholder.

Meals

This section discusses the exclusion rules that apply to de minimis meals and meals on your business premises.

De Minimis Meals

You can exclude any occasional meal you provide to an employee if it has so little value (taking into account how frequently you provide meals to your employees) that accounting for it would be unreasonable or administratively impracticable. The exclusion applies, for example, to the following items.

- Coffee, doughnuts, or soft drinks.
- Occasional meals or meal money provided to enable an employee to work overtime. However, the exclusion doesn't apply to meal money figured on the basis

of hours worked, or meals or meal money provided on a regular or routine basis.

- Occasional parties or picnics for employees and their guests.

TIP If food or beverages you furnish to employees qualify as a de minimis benefit, you can deduct their full cost. The 50% limit on deductions for the cost of meals doesn't apply. The deduction limit on meals is discussed in chapter 2 of Pub. 535.

Employee. For this exclusion, treat any recipient of a de minimis meal as an employee.

Employer-operated eating facility for employees. The de minimis meals exclusion also applies to meals you provide at an employer-operated eating facility for employees if the annual revenue from the facility equals or exceeds the direct operating costs of the facility. Direct operating costs include the cost of food, beverages, and labor costs (including employment taxes) of employees whose services relating to the facility are performed primarily on the premises of the eating facility. Therefore, for example, the labor costs attributable to cooks, waiters, and waitresses are included in direct operating costs, but the labor cost attributable to a manager of an eating facility whose services aren't primarily performed on the premises of the eating facility aren't included in direct operating costs.

For this purpose, your revenue from providing a meal is considered equal to the facility's direct operating costs to provide that meal if its value can be excluded from an employee's wages as explained under Meals on Your Business Premises, later. If you provide free or discounted meals to volunteers at a hospital and you can reasonably determine the number of meals you provide, then you may disregard these costs and revenues. If you charge non-employees a greater amount than employees, then you must disregard all costs and revenues attributable to these nonemployees.

An employer-operated eating facility for employees is an eating facility that meets all the following conditions.

- You own or lease the facility.
- You operate the facility. You're considered to operate the eating facility if you have a contract with another to operate it.
- The facility is on or near your business premises.
- You provide meals (food, drinks, and related services) at the facility during, or immediately before or after, the employee's workday.

Exclusion from wages. You can generally exclude the value of de minimis meals you provide to an employee from the employee's wages.

Exception for highly compensated employees. You can't exclude from the wages of a highly compensated employee the value of a meal provided at an employer-operated eating facility that isn't available on the same terms to one of the following groups.

- All of your employees.
- A group of employees defined under a reasonable classification you set up that doesn't favor highly compensated employees.

For this exclusion, a highly compensated employee for 2017 is an employee who meets either of the following tests.

1. The employee was a 5% owner at any time during the year or the preceding year.
2. The employee received more than \$120,000 in pay for the preceding year.

You can choose to ignore test (2) if the employee wasn't also in the top 20% of employees when ranked by pay for the preceding year.

Meals on Your Business Premises

You can exclude the value of meals you furnish to an employee from the employee's wages if they meet the following tests.

- They are furnished on your business premises.
- They are furnished for your convenience.

If you allow your employee to choose to receive additional pay instead of meals, then the meals, if chosen, aren't excluded. The exclusion also doesn't apply to cash allowances for meals.

On your business premises. Generally, for this exclusion, the employee's place of work is your business premises.

For your convenience. Whether you furnish meals for your convenience as an employer depends on all the facts and circumstances. You furnish the meals to your employee for your convenience if you do this for a substantial business reason other than to provide the employee with additional pay. This is true even if a law or an employment contract provides that the meals are furnished as pay. However, a written statement that the meals are furnished for your convenience isn't sufficient.

Meals excluded for all employees if excluded for more than half. If more than half of your employees who are furnished meals on your business premises are furnished the meals for your convenience, you can treat all meals you furnish to employees on your business premises as furnished for your convenience.

Food service employees. Meals you furnish to a restaurant or other food service employee during, or immediately before or after, the employee's working hours are furnished for your convenience. For example, if a waitress works through the breakfast and lunch periods, you

can exclude from her wages the value of the breakfast and lunch you furnish in your restaurant for each day she works.

Example. You operate a restaurant business. You furnish your employee, Carol, who is a waitress working 7 a.m. to 4 p.m., two meals during each workday. You encourage but don't require Carol to have her breakfast on the business premises before starting work. She must have her lunch on the premises. Since Carol is a food service employee and works during the normal breakfast and lunch periods, you can exclude from her wages the value of her breakfast and lunch.

If you also allow Carol to have meals on your business premises without charge on her days off, you can't exclude the value of those meals from her wages.

Employees available for emergency calls. Meals you furnish during working hours so an employee will be available for emergency calls during the meal period are furnished for your convenience. You must be able to show these emergency calls have occurred or can reasonably be expected to occur, and that the calls have resulted, or will result, in you calling on your employees to perform their jobs during their meal period.

Example. A hospital maintains a cafeteria on its premises where all of its 230 employees may get meals at no charge during their working hours. The hospital must have 120 of its employees available for emergencies. Each of these 120 employees is, at times, called upon to perform services during the meal period. Although the hospital doesn't require these employees to remain on the premises, they rarely leave the hospital during their meal period. Since the hospital furnishes meals on its premises to its employees so that more than half of them are available for emergency calls during meal periods, the hospital can exclude the value of these meals from the wages of all of its employees.

Short meal periods. Meals you furnish during working hours are furnished for your convenience if the nature of your business (not merely a preference) restricts an employee to a short meal period (such as 30 or 45 minutes) and the employee can't be expected to eat elsewhere in such a short time. For example, meals can qualify for this treatment if your peak workload occurs during the normal lunch hour. However, they don't qualify if the reason for the short meal period is to allow the employee to leave earlier in the day.

Example. Frank is a bank teller who works from 9 a.m. to 5 p.m. The bank furnishes his lunch without charge in a cafeteria the bank maintains on its premises. The bank furnishes these meals to Frank to limit his lunch period to 30 minutes, since the bank's peak workload occurs during the normal lunch period. If Frank got his lunch elsewhere, it would take him much longer than 30 minutes and the bank strictly enforces the time limit. The bank can exclude the value of these meals from Frank's wages.

Proper meals not otherwise available. Meals you furnish during working hours are furnished for your

convenience if the employee couldn't otherwise get proper meals within a reasonable period of time. For example, meals can qualify for this treatment if there are insufficient eating facilities near the place of employment. For an example of this, see the Example of qualifying lodging, earlier in this section.

Meals after work hours. Meals you furnish to an employee immediately after working hours are furnished for your convenience if you would have furnished them during working hours for a substantial nonpay business reason but, because of the work duties, they weren't eaten during working hours.

Meals you furnish to promote goodwill, boost morale, or attract prospective employees. Meals you furnish to promote goodwill, boost morale, or attract prospective employees aren't considered furnished for your convenience. However, you may be able to exclude their value as discussed under De Minimis Meals, earlier.

Meals furnished on nonworkdays or with lodging. You generally can't exclude from an employee's wages the value of meals you furnish on a day when the employee isn't working. However, you can exclude these meals if they are furnished with lodging that is excluded from the employee's wages as discussed under Lodging on Your Business Premises, earlier in this section.

Meals with a charge. The fact that you charge for the meals and that your employees may accept or decline the meals isn't taken into account in determining whether or not meals are furnished for your convenience.

S corporation shareholder-employee. For this exclusion, don't treat a 2% shareholder of an S corporation as an employee of the corporation. A 2% shareholder is someone who directly or indirectly owns (at any time during the year) more than 2% of the corporation's stock or stock with more than 2% of the voting power. Treat a 2% shareholder as you would a partner in a partnership for fringe benefit purposes, but don't treat the benefit as a reduction in distributions to the 2% shareholder.

Moving Expense Reimbursements

This exclusion applies to any amount you directly or indirectly give to an employee (including services furnished in kind) as payment for, or reimbursement of, moving expenses related to starting work at a new principal place of work. You must make the reimbursement under rules similar to those described in chapter 11 of Pub. 535 for reimbursement of expenses for travel, meals, and entertainment under accountable plans.

The exclusion applies only to reimbursement of moving expenses that the employee could deduct if he or she had paid or incurred them without reimbursement. However, it doesn't apply if the employee actually deducted the expenses in a previous year.